



**FEDERAL ELECTION COMMISSION**  
WASHINGTON, DC 20463

**JUN 15 2010**

**Carol A. Laham  
Wiley Rein LLP  
1776 K Street, NW  
Washington, DC 20006**

**RE: MUR 6038  
Club for Growth State Action**

**Dear Ms. Laham:**

On July 18, 2010, the Federal Election Commission notified your client, Club for Growth State Action, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On April 27, 2010, the Commission found, on the basis of the information in the complaint and information provided by your client, that there is no reason to believe Club for Growth State Action violated 2 U.S.C. § 441b. Accordingly, on June 4, 2010, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's no reason to believe finding, is enclosed for your information.

If you have any questions, please contact Joshua Smith, the attorney assigned to this matter at (202) 694-1624.

Sincerely,

A handwritten signature in black ink, appearing to read "Julie McConnell", is written over the typed name.

**Julie McConnell  
Assistant General Counsel**

**Enclosure  
Factual and Legal Analysis**

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**FEDERAL ELECTION COMMISSION  
FACTUAL AND LEGAL ANALYSIS**

**Respondent:** Club for Growth State Action

**MUR:** 6038

**I. INTRODUCTION**

This matter arises out of a complaint alleging that Club for Growth State Action ("CFGSA") coordinated its communications with Lamborn for Congress ("Lamborn Committee") by using the same voter list used by the Lamborn campaign to send flyers attacking Doug Lamborn's primary opponents during his 2006 campaign for Colorado's 5<sup>th</sup> Congressional District. The complaint also requests that, based on new information, the Federal Election Commission ("the Commission") reopen MUR 5774, which concerned similar allegations against the same respondents.

CFGSA, however, appears to have purchased an unenhanced list containing publicly-available voter data from TDS, and does not appear to have met any of the coordination conduct standards. Therefore, the Commission finds no reason to believe that CFGSA violated 2 U.S.C. § 441b.

**II. FACTUAL BACKGROUND**

**A. 2006 Complaint**

Doug Lamborn was a candidate in the open Republican Primary in Colorado's 5<sup>th</sup> Congressional District, held on August 8, 2006, and won the nomination with 27 percent of the vote. In a complaint filed in 2006, MUR 5774, Robert Gardner alleged that Lamborn's authorized committee obtained the names and addresses of absentee voters from the El Paso County Clerk and Recorder and provided them to CFGSA and Christian Coalition, and that these organizations used the addresses to send mailers to voters attacking two of Lamborn's primary

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1 opponents, Jeff Crank and Lionel Rivera, in July 2006. The 2006 complaint relied on a series of  
2 inferences – that two recipients received the flyers at their work addresses, which they had used  
3 to request absentee ballots; that only the Lamborn Committee and four other entities had  
4 requested absentee voter data from the county clerk's office; and that the Lamborn Committee  
5 and Christian Coalition were closely connected because Jonathan Hotaling, Lamborn's campaign  
6 manager, and Mark Hotaling, the Executive Director of Christian Coalition, are brothers – to  
7 conclude that CFGSA and Christian Coalition received the addresses from the Lamborn  
8 Committee. Because the allegations were speculative, and the respondents provided information  
9 sufficient to rebut them, the Commission found no reason to believe that the respondents violated  
10 the Act.<sup>1</sup>

11 **B. 2008 Complaint**

12 In 2008, a different complainant, Matthew Werner, submitted the instant complaint styled  
13 as a "Request to Reopen" MUR 5774. Although this complaint incorporates by reference the  
14 information from the 2006 complaint, it also provides new information alleging that TDS sold  
15 the same voter list to CFGSA through a sub-vendor, Blue Point LLC, which used the absentee  
16 voter list to send CFGSA mailers criticizing Lamborn's primary opponents for their positions on  
17 tax issues.<sup>2</sup>

18 The list at issue included the names and addresses of registered Republican voters who  
19 had requested absentee ballots in El Paso County – the county that accounted for 83 percent of

<sup>1</sup> See MUR 5774 (Lamborn for Congress), First General Counsel's Report dated Nov. 17, 2006, at 4, available at <http://egs.nichusa.com/egsdocs/00005A19.pdf>, and Certification dated Nov. 27, 2006, available at <http://egs.nichusa.com/egsdocs/00005A1A.pdf>.

<sup>2</sup> See *id.* at ¶¶ 9-13.

1 voters in the 5<sup>th</sup> District<sup>3</sup> – and identified which voters had returned their absentee ballots.<sup>4</sup>  
2 Many voters in Colorado vote by absentee ballot,<sup>5</sup> and in the 2006 5<sup>th</sup> District Republican  
3 primary, early and absentee votes accounted for 42.6 percent of all ballots cast.<sup>6</sup> Lamborn's  
4 campaign reportedly targeted absentee voters, using the absentee voter list to call and canvass  
5 voters and send multiple direct-mail flyers.<sup>7</sup> Absentee ballots apparently played a determinative  
6 role in the election: before absentee votes were counted, Lamborn's opponent, Jeff Crank, was  
7 ahead in the vote count, but Lamborn won when El Paso County posted the results from its  
8 absentee voters.<sup>8</sup> Jonathan Hotaling reportedly commented, "We out-hustled the other  
9 campaigns on the absenteecs, and we won absenteecs overwhelmingly, 2-to-1 over Jeff Crank. ...  
10 Other candidates were out talking to the general populace, but when we knew a voter had a ballot  
11 in their hand, we went to them."<sup>9</sup>

<sup>3</sup> See Erin Emery, *Absentees Key in Springs: Lamborn Focused 5th District Campaign on Mail-In Ballots*, DENVER POST, Aug. 10, 2006, at B5.

<sup>4</sup> See Farina Aff. at ¶¶ 5, 6.

<sup>5</sup> See *id.* at ¶ 5; see generally Kirk Johnson, *In Colorado, Voting by Mail Alters both Campaign Strategies*, NY TIMES, Oct. 17, 2008, at A19; John Ingold, *Mail-ins Changing Election Equation: The Number of Ballots Already in Voters' Hands is Forcing an Earlier Start to Campaigning*, DENVER POST, Aug. 10, 2008, at B1; Karen Crumney, *Early Votes Blunt October "Surprises:" In Some States, 50 Percent Cast Ballots before Election Day, Altering Political Parties' Campaign Tactics*, DENVER POST, Oct. 15, 2006, at A1.

<sup>6</sup> See Emery, *supra* n. 3.

<sup>7</sup> See *id.*

<sup>8</sup> See *id.*; see also Dick Foster and Joe Garner, *Late Surge by Lamborn Stuns Crank: El Paso's Absentees Set Up Race Against Democrat Fawcett*, ROCKY MTN. NEWS, Aug. 9, 2006, at A7 ("[W]hen about 17,000 absentee votes were released... Lamborn immediately went from trailing Crank by 1,500 votes to victory."); Anthony Suraec, *Was the Crank/Lamborn Race a Preview of McCain/Obama?*, ROCKY MTN. RIGHT, at <http://rockymountainright.com/?a=node/428> (Oct. 30, 2008) ("As the results from the 2006 Republican primary in CD-5 rolled in on election night[,] Jeff Crank took a decent lead over Doug Lamborn. Crank was ahead of Lamborn in every county including El Paso[,] and every major media outlet in the state declared him the victor. Much to everyone's surprise, El Paso County entered all of the absentee ballots [after] the other votes had been tallied. The electorate had turned so sharply [against] Lamborn in the final days of the election that Crank won the votes on election day and the final days of early voting. Lamborn's lead in the absentee votes cast weeks prior was enough to negate all of Crank's gains.").

<sup>9</sup> Emery, *supra* n. 3.

The complaint centers on the following players and transactions.

## PLAYERS

- TDS, a political campaign data management firm headquartered in Grand Junction, Colorado, that collects, assembles, and sells voter data information, including donor files, survey data, personal contact information, master voter files, and phone records. The CEO and Chairman of TDS is Tom Bjorkland.<sup>10</sup>
- Jonathan Hotaling, who, at the time of the alleged coordination, was the campaign manager for Lamborn and a board member of TDS.<sup>11</sup>
- Liberty Service Corp. (a/k/a Liberty Media), a sub-vendor owned and operated by Jonathan Hotaling.<sup>12</sup> Liberty Service Corp. contracted with Lamborn for Congress during the 2006 election cycle to perform campaign management services, including database management and enhancement, and contracted with TDS to obtain their specialized data management and enhancement services.
- CFGSA, a 501(c)(4) organization that serves as the "umbrella group" for Club for Growth's state affiliates.<sup>13</sup>
- Blue Point LLC, a political consulting firm hired by CFGSA to create, design, print, and mail three anti-tax flyers to absentee voters in El Paso County, Colorado, over the course of four days in July 2006.<sup>14</sup> Christopher Baker is the principal of Blue Point.<sup>15</sup>

## ALLEGED TRANSACTIONS

- TDS collected data identifying which voters had requested absentee voters and which voters had returned their absentee ballots from Jonathan Hotaling and from county clerks

<sup>10</sup> See Farina Aff. at ¶ 3; TDS Website, at <http://tacticaldatasolutions.net/contact.html> (last visited Sept. 14, 2009).

<sup>11</sup> See Farina Aff. at ¶¶ 3, 8.

<sup>12</sup> See Farina Aff. at ¶ 7; Liberty Service Corp., Articles of Incorporation (Aug. 15, 2000).

<sup>13</sup> See Chris Casteel, *Group Funding Lawmaker's Ad*, DAILY OKLAHOMAN, June 24, 2006; see also CFGSA, 2007 Form 990 (Jul. 31, 2008), available at <http://www.guidestar.org/FinDocuments/2007/900/135/2007-900135424-048a645d-90.pdf>.

<sup>14</sup> See MUR 5774, Baker Aff. at ¶¶ 5-7, available at <http://eqs.nictusa.com/eqsdocs/00005A17.pdf>; MUR 5774, Compl. Attach. 2-4, available at <http://eqs.nictusa.com/eqsdocs/00005A0F.pdf>.

<sup>15</sup> Baker Aff. at ¶ 2; MUR 5774, Baker Aff. at ¶ 2; cf. MUR 5609 (Club for Growth), First General Counsel's Report dated Aug. 5, 2005, at 4, available at <http://eqs.nictusa.com/eqsdocs/00004846.pdf>.

and recorders.<sup>16</sup> TDS then "enhanced" this data using approximately 10-14 different processes and deemed it fit for resale.<sup>17</sup>

TDS sold the enhanced absentee voter data to Liberty Service Corp., a sub-vendor owned by Jonathan Hotaling that provided media and fundraising consulting to the Lamborn Committee.<sup>18</sup> The Lamborn campaign apparently used this voter list to target absentee voters.<sup>19</sup>

TDS also sold the absentee voter list to Blue Point, which used it to send CFGSA mail pieces.<sup>20</sup> Farina allegedly received a call from a representative of Blue Point, presumably Christopher Baker, and transferred the call to Tom Bjorkland, who later told Farina that the voter data would be used by CFGSA as part of its efforts in the 5<sup>th</sup> District.<sup>21</sup> Bjorkland also allegedly informed Farina that Jonathan Hotaling had referred Blue Point to TDS and instructed Farina not to tell anyone about this because it was "a gray area."<sup>22</sup>

### III. LEGAL ANALYSIS

According to the complaint, CFGSA coordinated with the Lamborn Committee when it used the same voter lists to send flyers attacking Lamborn's opponents in the 5<sup>th</sup> District Republican primary, resulting in prohibited in-kind contributions. See 2 U.S.C. § 441b. Under the Act, an expenditure made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of" a candidate constitutes an in-kind contribution. See 2 U.S.C. § 441a(a)(7)(B)(i); 11 C.F.R. § 109.20(a). A communication is coordinated with a candidate or

<sup>16</sup> See Farina Aff. at ¶ 6.

<sup>17</sup> See TDS Services, at <http://tacticaldatasolutions.net/services.html> (last visited Sept. 14, 2009).

<sup>18</sup> See Farina Aff. at ¶¶ 7-8; see also Lamborn for Congress, 2006 July Quarterly Report (amended Sept. 25, 2009) (listing \$15,000 disbursement to Liberty Service Corp. for media and fundraising consulting).

<sup>19</sup> See Emery, *supra* n.6; cf. MUR 5774, Complaint at 2 (identifying Lamborn for Congress as a recipient of absentee voter data from the El Paso County Clerk and Recorder); Lamborn for Congress, 2006 Pre-Primary Report (amended Sept. 25, 2009) (listing \$250 disbursement to El Paso County Clerk and Recorder for absentee voter information); Lamborn for Congress, Amended July Quarterly Report (amended Sept. 25, 2009) (listing \$450 disbursement for absentee voter information).

<sup>20</sup> See Farina Aff. at ¶¶ 10-13; Baker Aff. at ¶¶ 6-10; MUR 5774, Baker Aff. at ¶¶ 7, 8, 10.

<sup>21</sup> See Farina Aff. at ¶ 10.

<sup>22</sup> See *id.* at ¶ 11. This paragraph states, "I referred the caller from Blue Point to Tom Bjorkland. He told me that John Hotaling had referred Blue Point to TDS, and he also told me not to tell anyone about it, because it was, in his words, 'a gray area.'" Although it is unclear from this wording whether "he" refers to the caller from Blue Point or Bjorkland, based on Christopher Baker's affidavit attesting that he had no knowledge that TDS directly or indirectly provided voter lists to the Lamborn campaign, see Baker Aff. at ¶ 10-12, we assume that Bjorkland was the source of this information.

1 candidate committee when: (1) the communication is paid for by a person other than that  
2 candidate, authorized committee or agent thereof; (2) the communication satisfies at least one of  
3 the four "content" standards described in 11 C.F.R. § 109.21(c);<sup>23</sup> and (3) the communication  
4 satisfies at least one of the six "conduct" standards described in 11 C.F.R. § 109.21(d). *See*  
5 11 C.F.R. § 109.21(a).

6 The first and second prongs of the coordination regulations are met. The flyers were paid  
7 for by CFGSA, not the Lamborn Committee, *see* 11 C.F.R. § 109.21(a)(1), and the mailings were  
8 "public communications" identifying Lamborn's primary opponents, directed to 5<sup>th</sup> District  
9 absentee voters, and sent within 90 or 120 days before the primary election.<sup>24</sup> *See* 11 C.F.R.  
10 § 109.21(c)(4). Therefore, the only question is whether the alleged activities satisfy any of the  
11 conduct standards.  
12

<sup>23</sup> After the decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (Court of Appeals affirmed the District Court's invalidation of the fourth, or "public communication," content standard of the coordinated communications regulation), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. In a subsequent challenge by Shays, the U.S. District Court for the District of Columbia held that the Commission's content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not vacate the regulations or enjoin the Commission from enforcing them. *See Shays v. FEC*, 508 F.Supp.2d 10, 70-71 (D.D.C. Sept. 12, 2007) (*Shays III*) (granting in part and denying in part the respective parties' motions for summary judgment). The D.C. Circuit affirmed the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) (*Shays III Appeal*). On October 8, 2009, the Commission began a rulemaking to comply with this ruling. *See Notice of Proposed Rulemaking*, Coordinated Communications, 74 Fed. Reg. 53,893 (Oct. 21, 2009).

<sup>24</sup> Effective July 10, 2006, section 109.21(c) requires a "public communication" within 90 days of a House or Senate election, as opposed to the previous 120-day standard. *See Explanation and Justification*, Coordinated Communications, 71 Fed. Reg. 33,190, 33,197-98 (Jul. 10, 2006). It is unclear whether the mailers in this case were distributed before or after the effective date of this change, but the alleged activities appear to have occurred well within either time frame – the July 11, 13, 15, and 18, 2006 dates cited in the complaint were 28 or fewer days before the primary election. *See Complaint* at 2.

**A. Publicly Available Source Safe Harbor**

Before applying the conduct standards, we first examine a threshold issue of whether the voter data was obtained from a “publicly available source,” and is thus excluded from the “material involvement,” “substantial discussion,” “common vendor,” and “former employee” conduct standards. *See* 11 C.F.R. §§ 109.21(d)(2)-(5); *Revised Explanation and Justification*, Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (Jun. 8, 2006). Under this safe harbor, a communication that uses public information (*e.g.*, information from newspaper or magazine articles, candidate speeches or interviews, materials on a candidate’s website or other publicly available website, transcripts from television shows, and press releases) is not a coordinated communication unless it meets the “request or suggestion” conduct standard. *See Revised E&J*, 71 Fed. Reg. at 33,205. The person paying for the communication bears the burden of showing that the information used in creating, producing, or distributing the communication was obtained from a publicly available source – for example, by demonstrating that media buying strategies regarding a communication were based on information obtained from a television station’s public inspection file, and not on private communications with a candidate or political party committee. *See id.*

It appears that TDS sells two categories of data to political clients: proprietary data, including survey data, donor files, and personal contact information, and public data, including master voter files from election offices, phone records. Moreover, it appears that TDS did not sell raw data obtained from the El Paso County Clerk and Recorder to Liberty Service, but instead sold “processed” or “enhanced” data. While it is unclear what processes TDS uses to enhance the absentee voter data sold here, its website states that, among other things, it can update public voter lists by comparing addresses to the national change of address database to

1 reduce the number of "bad" addresses; identifying voters who voted in previous elections; and  
2 identifying voters who prefer early and absentee voting, allowing campaigns to "use this  
3 information to target mailings timed to reach particular voters when they are most likely to be  
4 voting."<sup>25</sup> Thus, the voter list sold by TDS to Liberty Service does not appear to be covered by  
5 the publicly available source safe harbor.

6 CFGSA states, however, that Blue Point purchased a "commoditized" list containing  
7 information about Republican primary voters who had requested absentee ballots in El Paso  
8 County, not a specially packaged list, and that Blue Point did not ask for advice from TDS as to  
9 the type of list to use or how best to use the list.<sup>26</sup> Because the available information suggests  
10 that CFGSA purchased unenhanced absentee voter data from TDS, the publicly available  
11 source safe harbor appears to apply.

12 **B. Club for Growth State Action**

13 Even if the safe harbor does not apply, CFGSA's response appears to have sufficiently  
14 refuted the allegation that it engaged in coordination. While Farina's affidavit asserts that TDS  
15 sold the same voter list to Blue Point for CFGSA's direct-mail efforts in the 5<sup>th</sup> District, it does  
16 not allege that Blue Point or CFGSA requested the same voter list used by the Lamborn  
17 Committee or received this voter list in response to a suggestion by Jonathan Hotelling.  
18 Moreover, Christopher Baker attests that the voter list requested and received by Blue Point was  
19 not specially packaged; that he did not inform Jonathan Hotelling of the reason for requesting the  
20 voter list or mention CFGSA or its proposed mailers or any other of its projects, plans, activities  
21 or needs; that he did not disavow with Hotelling the plans, projects, activities, or needs of the

<sup>25</sup> TDS Website, at <http://tacticaldatasolutions.net/services.html> (last visited Dec. 4, 2009).

<sup>26</sup> See CFGSA Response at 6-7; Baker Aff. at ¶¶ 12-13.

Lamborn campaign or list vendors for a particular Congressional District or area in Colorado;  
and that he took steps to avoid employing vendors used by the Lamborn campaign.<sup>27</sup>

Even if Farina's affidavit is true, brief and vague discussions about a voter list do not  
constitute "substantial discussions" about Lamborn's plans, projects, activities or needs, or  
establish that the CFGSA's flyers were created, produced, or distributed after such discussions.

Cf. MUR 5887 (RMSP PAC), Factual and Legal Analysis (possible substantial discussions  
where candidate's campaign manager reportedly "hounded" third party and "kept telling" the  
third party to get ads on the air). Nor is the alleged conduct sufficient to meet the "request or  
suggestion," "material involvement," or "common vendor" conduct standards. Based on the  
quality of the competing affidavits, the available facts do not establish that CFGSA met any of

<sup>27</sup> See generally Baker Aff. at ¶¶ 4-13; MUR 5774, Baker Aff. at ¶¶ 5-16; see also CFGSA Response at 5-8.

- 1 the conduct standards in 11 C.F.R. § 109.21(a).<sup>28</sup> Therefore, the Commission finds no reason to  
2 believe that Club for Growth State Action violated 2 U.S.C. § 441b.

<sup>28</sup> CFGSA also asserts that the Commission's no-reason-to-believe finding on the 2006 complaint bars examination of the 2008 complaint on the grounds of *res judicata*. Because *res judicata* is an affirmative defense, see FED. R. CIV. P. 8(c)(1), and the Commission finds no reason to believe that CFGSA violated the Act in the instant matter, the Commission need not reach this issue. Nonetheless, in the interest of completeness, we conclude that the prior no-reason-to-believe finding does not preclude Commission consideration of this complaint. *Res judicata*, which includes claim and issue preclusion, applies to administrative agency decisions only when the agency acted "in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *U.S. v. Utah Construction and Mining Company*, 384 U.S. 394, 421-22 (1966); see also *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 111 (1991). This same analysis applies to determine whether an agency's actions preclude its own subsequent consideration. See *Duvall v. Attorney Gen. of the U.S.*, 436 F.3d 382 (3d Cir. 2006).

Claim and issue preclusion do not apply here; the Commission does not act in a judicial capacity at the reason to believe stage. See *FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 241-243 (1980) ("[T]he Commission's averment of 'reason to believe' that Socal was violating the Act is not a definitive statement of position. It represents a threshold determination that further inquiry is warranted and that a complaint should initiate proceedings. ... Thus, the averment of reason to believe is a prerequisite to a definitive agency position on the question whether Socal violated the Act, but itself is a determination only that adjudicatory proceedings will commence."); cf. *Democratic Senatorial Campaign Comm. v. FEC*, 660 F.2d 773, 778 n.27 (D.C. Cir. 1980) (rejecting argument that claim and issue preclusion prevented court from reviewing Commission's no-reason-to-believe finding because the Act provides for judicial review), *rev'd on other grounds*, 454 U.S. 27, 39-41 (1981). Indeed, the reason to believe stage is simply the statutory mechanism by which the Commission initiates an investigation. See 2 U.S.C. § 437g(a)(2). Moreover, not only does the 2008 complaint include new information unknown to the 2006 complainant, but the two complainants are different, and there is no known privity between them. See *Taylor v. Sturgell*, 128 S.Ct. 2161, 2172-2173, 2176, 2178 (2008) (rejecting preclusion based on "virtual representation" of a non-party by a party in a prior proceeding); *Federal Trade Comm'n v. Raladam*, 316 U.S. 149, 150, 153 (1942) (judicial vacatur of a cease and desist order based on an insufficient factual record to support charges of unfair competition did not preclude a second agency proceeding and cease and desist order based on an improved record).